Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-949

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

WALTER WASHINGTON, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

WILLIAM J. SCOTT
Attorney General
State of Illinois

MELBOURNE A. NOEL
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-1090
Attorneys for Petitioner

GERRI PAPUSHKEWYCH
Assistant Attorney General
Of Counsel.

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

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The Attorney General of Illinois, on behalf of the State of Illinois, petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is not yet reported; it is attached in full as Appendix A. The opinion of the Illinois Appellate Court is reported at 41 Ill. App. 3d 475, 354 N.E.2d 501 and is attached as Appendix B.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on October 5, 1977. No petition for rehearing was filed and this petition was filed within ninety days of the entry of the judgment order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Illinois Supreme Court err in holding that respondent's waiver of his right against self-incrimination and right to counsel was insufficient where the record clearly shows that respondent knowingly and voluntarily waived those rights?
2. Should the exclusionary rule be applied where police conduct is non-egregious and rights are waived knowingly and voluntarily by a fully informed defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... [N]or shall any person ... be compelled in any criminal case to be a witness against himself, ..."

STATEMENT OF THE CASE
NATURE OF THE CASE

After a jury trial in the Circuit Court of Winnebago County Respondent was found guilty of Murder and Armed Robbery. He was sentenced to concurrent terms of imprisonment of fifty to one hundred years for Murder and six to twenty for Armed Robbery.

Prior to trial, respondent filed various motions, including a motion to suppress certain statements he made to Rockford city police while in custody. The motion was denied after a hearing. Some of the statements made by respondent were used against him at trial over his objection. It is the admissibility of these statements which is at issue: both the Illinois Appellate and Supreme Court held that the statements were improperly admitted at trial.

POST-ARREST PROCEDURES

Moments after Kappa Sharp was robbed at gunpoint at the Pacemaker Store and 16 year old Henry Gregg was fatally shot, respondent was arrested in a nearby garage with the gun later determined to be the murder weapon and large sums of currency in five and ten denominations at his feet (Tr. 334).[1] After his arrest respondent was twice advised of his rights by police officers: once at the scene of arrest and once in the squad car enroute to the police station. Respondent replied that he understood his rights (Tr. 26).

Upon his arrival at the police station respondent was questioned by Detective Cronk, who first advised him of

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1. The designation Tr. now and hereinafter refers to the transcript of the state proceedings in Indictment No. 2363 in the Circuit Court of Winnebago County.

his rights by handing him a rights waiver form and having him read it out loud. (Tr. 27, 28). Respondent stated he understood his rights and signed the waiver form[2] with the name William Brown. (Tr. 28).

Respondent made a total of three oral statements that evening. After making his original statement to Detective Cronk he repeated it twice in the presence of other detectives, the latter two statements containing minor variations from the first. (R. 40-41). Respondent during this time was photographed, placed in a lineup and a neutron activation test was performed. At approximately 1:00 A.M., after the lineup, respondent was brought back to the interrogation room and asked if he wished to talk to the officers any more. He indicated that he did not wish to do so. At that time he was taken to the booking room at the police department and asked if he wanted to make a phone call. He replied that he did not and signed a telephone log to that effect. (Tr. 42). At no time during the questioning did the defendant ever ask to stop the questioning nor did he ask for a lawyer. (Tr. 42). Defendant was ques-

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2. The standard waiver forms used by Rockford city police were signed by respondent. These forms contain two sections and read as follows: "YOUR RIGHTS. Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advise [sic] before we ask you any questions if you wish. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." "WAIVER OF RIGHTS. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." Following the waiver section are spaces for signatures of the person being questioned and of witnesses.

tioned that evening for approximately one hour and a half. (Tr. 47).

The next day, March 23, 1974, at approximately 9:30 A.M. respondent was brought to the detective bureau. Detectives Bland and Fagin first advised him of his rights and asked if he understood them. Respondent replied that he did understand his rights, that he was willing to talk to the police officers, and willing to sign a waiver. He then signed the rights waiver form. (R. 60). After the rights waiver was signed the officers had a conversation with respondent about his activities on the preceding evening of March 22, 1974. (R. 60).

Shortly thereafter respondent indicated that he wanted to call an attorney, and that he wanted a public defender. The detectives told him that they could not give him a public defender because the court would have to determine whether he was entitled to the services of a public defender; however, they told him he could call any lawyer he wanted and gave him a telephone book with a listing of attorneys. (R. 66). Defendant looked up the number of the public defender and dialed it, but received no answer. (R. 61). After he hung up the telephone, the detectives asked him if he still wanted to talk to them even though he had not talked to an attorney. Respondent said that he did, that he wanted to get the truth out, but that first he wanted to make another telephone call to talk to his mother. (Tr. 61-2, 105-6).

Respondent then made two telephone calls, one to his mother, who he was unable to reach, and one to his girlfriend. The officers later learned that the call to his girlfriend had been taped by the radio operator (Tr. 106). The officers and respondent went to the radio room and listened to the recording of respondent's call to his girl-

friend. They then returned to the detective bureau for further questioning.

At approximately 1:10 P.M. in the afternoon, the interview with respondent was concluded. Shortly before 1:00 P.M. respondent had been asked to take a lie detector test; at first he had agreed and had signed a waiver to that effect. Prior to taking it, however, respondent told detectives Bland and Fagin that before he took the test he wanted to consult with a lawyer. (R. 75). Respondent then attempted to call the public defender, but received no answer. (Tr. 64). All questioning then ceased and respondent was returned to the jail cell.

At approximately 5:30 P.M. on March 23, 1974, respondent asked to speak to "some detective" (Tr. 78, 86); pursuant to this request he was brought to the detective bureau. Detectives Cronk and Gessner first advised respondent of his rights by reading the rights waiver form to him. Detective Gessner asked respondent if he understood his rights and he said that he did, that he had been advised before. Respondent then read and signed the rights waiver form.[3] (Tr. 79, 91). When asked if he wanted to tell the detectives about what had happened the previous evening, respondent replied that he did not want to make a statement at that time but that he wanted to speak to a priest and a psychiatrist. Detective Gessner told respondent that they could probably get a priest for him that evening, but that a psychiatrist would be assigned once he got to the county jail. (Tr. 79). Asked if he wanted to make a telephone call, respondent indicated that he did; he then called his mother and talked to her.

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3. The same form quoted in n. 2, *supra*, was read and signed by respondent; the original waiver form was entered into evidence as People's Exhibit No. 28. (Tr. 408).

After respondent's conversation with his mother, Detective Gessner asked him how he felt and he replied that "he felt real bad about the dead boy, his family, and also his family." (Tr. 80). Detective Gessner then asked respondent if he was alone the night of the robbery and respondent replied that he was alone when he left Freeport and had been alone all night long. Then the detective asked him whose car he had the night of the robbery and he replied by saying that he wanted to talk but wanted more time to think about it. At this time respondent was taken back to his cell. (Tr. 80-81).

At approximately 8:00 P.M. that same evening, Father Wentig, a priest, spoke with respondent for approximately forty-five minutes. Afterwards Detectives Cronk and Gessner asked respondent whether it was necessary to advise him of his rights, and he replied that it was not necessary because he understood them. (Tr. 81). Detective Gessner then asked respondent whether "other than last night, was there any robbery or anything else he had been involved in that he would want to tell me about." (Tr. 423). Respondent replied that there had been one other robbery but that he got nothing out of it, and that is why he tried again. He further stated that he wanted to tell the detectives about it because he didn't want an innocent person going to jail. (Tr. 411, 423). When the detective asked him whether the earlier robbery had taken place in Rockford or Freeport, respondent replied: "I had better talk to my attorney." (Tr. 423). There was no further questioning. Respondent then called Craig Peterson of the Public Defender's Office and talked to him. (Tr. 86-91).

PROCEEDINGS ON MOTION TO SUPPRESS STATEMENTS

Prior to trial respondent filed a motion to suppress the statements made by him while in custody on March 23, 1974. He argued that his interrogation after he requested to speak to an attorney was in violation of *Miranda v. Arizona*, 384 U.S. 447 (1966) and that the police had rendered the *Miranda* warnings nugatory by telling the defendant that they could not appoint an attorney for him and that he would have to wait until he went to court.

A hearing was held on respondent's motion to suppress, at which both respondent and the officers involved in respondent's arrest and questioning testified. After the hearing the trial court denied respondent's motion to suppress.[4] The court found that Detective Bland's statement to respondent that a public defender could not be appointed for him until he went to court did not affect respondent's conduct because after this statement the detectives provided him with a phone book and phone to call an attorney and because respondent did indeed attempt to call a lawyer. (Tr. 208).

During respondent's trial, none of the statements made by respondent during the period of interrogation on March 23, 1974, from 9:30 A.M. to 1:10 P.M. were introduced into evidence. Statements which respondent made during his contacts with police officers between 5:30 and 8:30 P.M. on the evening of March 23, after he had requested to see a detective, were used in evidence against him over his continuing objection.

After conviction, respondent appealed his conviction to the Illinois Appellate Court on several grounds, one of

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4. The trial court granted respondent's motion to suppress the telephone conversation between him and his girlfriend which had been taped by the radio operator. (Tr. 20).

which was that the statements introduced at trial were admitted in violation of his Fifth and Sixth Amendment rights. The Illinois Appellate Court, Second District, reversed respondent's conviction and remanded the case for a new trial. Citing this Court's decision in *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321 (1975) the appellate court held that all statements made by respondent after he requested counsel were inadmissible because his right to cut off questioning had not been "scrupulously honored." (Appendix B).

The State filed a petition for leave to appeal to the Illinois Supreme Court, which that court granted. In a four to two decision[5] the Illinois Supreme Court affirmed the decision of the Appellate Court. The majority of that court held that respondent had not effectively waived his right to counsel and therefore his statements were improperly admitted at trial.

The dissenting justices questioned the correctness of the majority's opinion that a *Miranda* violation occurred, focusing on the fact that respondent had initiated the conversation which resulted in the challenged statements. Even if the statements were erroneously admitted, however, the dissentors would have affirmed the conviction holding that the error was harmless beyond a reasonable doubt because of the overwhelming evidence of respondent's guilt. *Chapman v. California,* 386 U.S. 18, 81 S.Ct. 824 (1967).

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5. Mr. Justice Moran did not participate in the decision of this case, as he had been a concurring member of the panel of the Appellate Court, Second District, when that court had reversed respondent's conviction and remanded it for new trial.

REASONS FOR GRANTING THE WRIT

I.

The Illinois Supreme Court erred in holding that respondent's waiver of his right against self-incrimination and right to counsel was insufficient where the record clearly shows that respondent knowingly and voluntarily waived those rights.

In *Miranda v. Arizona,* 384 U.S. 436, 475 (1966) this Court recognized that an individual in custody could voluntarily, knowingly and intelligently waive his rights to remain silent and his right to counsel. That waiver is possible after an initial assertion of the right to remain silent was made clear in *Michigan v. Mosley,* 423, U.S. 96 (1976) which addressed the procedures permissible after an assertion of the right to remain silent. Whether waiver is possible after an individual requests to see an attorney is a question which this Court has not yet addressed.

In the instant case, the Illinois Supreme Court was faced with the question of whether an individual in custody who initially indicates a desire for counsel can later waive that right without having consulted with an attorney. The Illinois Supreme Court held that waiver was possible in such a situation, a result consistent with the holdings of the majority of federal and state courts which have considered the issue.[6]

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6. Cases holding that waiver is possible include *U.S. ex. rel. Foye v. New Jersey,* 547 F.2d 217 (3rd Cir., 1977), *U.S. v. Grant,* 549 F.2d 942 (4th Cir., 1977), *Nash v. Estelle,* 560 F.2d 652 (5th Cir., 1977), *Lindsay v. U.S.,* 542 F.2d 757 (8th Cir., 1976), *U.S. v. Pheaster,* 544 F.2d 353 (9th Cir., 1976) *cert. den.* in *Inciso v. U.S.,* 97 S. Ct. 1118 (1977), *U.S. v. Lewis,* 425 F. Supp. 1166 (D. Conn., 1977). There is some support for the position that *Miranda* creates a *per se* rule prohibiting waiver after an assetion of counsel: *U.S. v. Flores-Calvillo,* Docket No. 75-3785 (9th Cir., July 14, 1976) *pending petition for rehearing en banc; U.S. v. Jakakas,* 423 F. Supp. 564 (E.D.N.Y., 1976). See also concurring opinion of Justice White in *Michigan v. Mosley,* 423 U.S. 96, 107, 109-110 (1975).

Having held that such a waiver is possible, however, the court then decided that the State did not meet its burden of showing that respondent knowingly and voluntarily waived his right to counsel. It is obvious from the facts of this case that the Illinois Supreme Court incorrectly read the record when it failed to find waiver of counsel by respondent.'

The facts show that respondent's requests for an attorney were made at approximately 9:30 A.M. and 1:30 P.M. After the first attempt to call his attorney, respondent affirmatively stated that he wanted to talk to the police officers even though he had not talked to an attorney. After his second attempt to call an attorney, all questioning ceased until respondent himself requested to see some detectives. At that time, prior to any questioning, respondent was orally advised of his rights, and responded that he understood them; he then read the rights waiver form and signed it. Among other things the waiver form clearly stated that "I do not want a lawyer at this time."

Having expressly waived his right to an attorney, respondent did not negate the waiver of his right to an attorney in any manner. He did not request to see or talk to an attorney or even to call one at any time prior to making the statements the admissibility of which are in question. When given an opportunity to make a phone call at this time, he called his Mother and talked to her.

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7. Although there is some suggestion in the opinion of the Illinois Supreme Court that respondent's request for counsel involved the Sixth Amendment right to counsel, the assertion of the right to counsel in a custodial situation is not based on the Sixth Amendment guarantee of right to counsel at a critical stage of criminal proceeding (*Brewer v. Williams*, 430 U.S. 387 (1977), but is based on effectuation of the individual's Fifth Amendment right against self-incrimination.

Respondent's statement following his waiver of rights that he did not want to make a statement at that time can arguably be construed as an assertion of the right to silence; it is impossible to construe that statement as an assertion of the right to counsel. That statement, however, raises the question of whether respondent waived his right to silence, an issue not addressed by the Illinois Supreme Court.

In *Miranda v. Arizona*, 384 U.S. at 475 the court stated that waiver of Fifth Amendment rights would be tested under the standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) to determine whether there was an "intentional relinquishment or abandonment of a known right or privilege". Applying that test to the facts of this case, it is clear that respondent waived his privilege against self-incrimination.

There is overwhelming evidence in the record that respondent fully understood what his constitutional rights were and the consequences of their waiver. It is uncontroverted that respondent was properly advised of his rights at least five times during the 23-hour custodial period under scrutiny here. Each time respondent affirmatively indicated that he understood his rights and then went on to demonstrate his understanding by cutting off questioning when he no longer wished to talk to officers.

Furthermore, there are no allegations that respondent's statements were involuntary or the result of coercion. Petitioner was not isolated and had frequent access to the outside via telephone. Respondent himself provided the reason for his statements to the police, indicating several times that he was talking to the police because he wanted the truth to come out.

Thus, although the Illinois Supreme Court purportedly applied the standard for waiver of constitutional rights in reaching its decision, the above analysis shows that application of that standard must result in the conclusion that respondent knowingly and voluntarily waived his constitutional rights and the Illinois Supreme Court erred in holding that he did not.

II.

The exclusionary rule should not be applied where police conduct is non-egregious and rights are waived knowingly and voluntarily by a fully informed defendant.

This case presents the Court with an opportunity to review the *per se* exclusionary rule adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966) as applied to the standard to be used in reviewing an individual's waiver of his privilege against self-incrimination after he has been fully and properly informed of his rights.[8]

Although not the articulated basis for the decision of the court, the Illinois Supreme Court's reliance on and quotations from *Michigan v. Mosley, supra,* indicate that the court's holding resulted from the application of the prophylactic rule of *Miranda v. Arizona,* 384 U.S. at 436. Rigid application of that rule requires that if a question is improperly asked by authorities, the resulting statement cannot be used in evidence against that person without regard to the actual voluntariness of the statement. In effect, *Miranda* creates an irrebutable presumption that such a statement is coerced.

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8. Review of the *Miranda per se* rule was not requested by either party in *Michigan v. Mosley*, 423 U.S. at 100; although argued by the parties in *Brewer v. Williams*, 430 U.S. at 438, that case was decided on the basis of the Sixth Amendment right to counsel and arguments of the State of Iowa and others as *amici curiae* that the procedural ruling of *Miranda* be re-examined and overruled were not considered.

Using a strict *Miranda* analysis on these facts, respondent's statement that he wanted a priest and psychiatrist but did not want to make a statement at that time must be read as an assertion of his right to remain silent. After that assertion, any further questioning by the police officers was improper. Thus the question which the officer asked after respondent's call to his mother to which respondent answered that he had been alone the past night was improper and according to *Miranda*, the penalty for the impropriety is exclusion of the statement.

The second challenged statement was made after respondent had spent approximately forty-five minutes with the priest he had requested to talk to. The impropriety of this questioning under strict *Miranda* analysis is less clear, as the questions were asked after a period of time had elapsed, after respondent had spoken to a priest as he had requested, and after he was reminded of his constitutional rights and indicated that he understood them. *Michigan v. Mosley*, 423 U.S. at 104. Further, as in *Mosley*, the question respondent was asked at that time was directed to offenses other than the one he was being held in custody for. Assuming *arguendo*, however, that this questioning was improper, application of the *per se* rule of *Miranda* would require exclusion of those statements also.

Thus, under the formalistic analysis of *Miranda* both of the challenged statements must be excluded. This is so despite the factual demonstration of the knowing and intelligent nature of respondent's waiver, as discussed above. Because there is no question of the voluntariness of the statements, there is no risk of the evidence being unreliable and no danger posed to the individual's free will. Thus the only justification for exclusion of reliable and probative evidence is deterrence of unconstitutional police conduct.

The deterrent effect of exclusion of evidence in a situation such as this, where the improper conduct was clearly non-egregious, is of uncertain value. The benefit of exclusion is even less apparent where, as here, the uncertainty of the proper application of constitutional principles has been demonstrated by the various results reached by attorneys and courts judging the police actions in retrospect with the benefit of current Fifth Amendment research.

Petitioner respectfully requests that this Court review the rule which requires that reliable evidence voluntarily given be suppressed because a "constable blunders" by asking a question when he should not. Where the improper police behavior sought to be deterred consists of an inability to properly apply the mechanistic approach of *Miranda* to a fluid situation aggravated by respondent's constantly changing desires with respect to his rights, any deterrence value of exclusion is far outweighed by the cost of such exclusion to the reliability of the factfinding process and to society. Petitioner therefore urges that this Court reexamine and overrule the *per se* rule of *Miranda* which requires exclusion of statements voluntarily made by fully informed defendants and adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant.

CONCLUSION

For the foregoing reasons, petitioner The People of the State of Illinois respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois
MELBOURNE A. NOEL
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-1090
Attorneys for Petitioner

GERRI PAPUSHKEWYCH
Assistant Attorney General
Of Counsel.

APPENDIX A

Docket No. 48972 — Agenda 13 — May 1977.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

WALTER WASHINGTON, JR.,

Appellee.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

In a jury trial in the circuit court of Winnebago County, defendant, Walter Washington, Jr., was convicted of the offenses of murder and armed robbery. The appellate court reversed and remanded (41 Ill. App. 3d 475), and we granted the People's petition for leave to appeal. The facts are adequately stated in the appellate court opinion and will be repeated here only to the extent necessary to discuss the issues.

On March 22, 1974, shortly before 9 p.m., the Pacemaker Grocery Store in Rockford was robbed by an armed man wearing a woman's plaid cape with a hood, and a ski mask over his face. The robber left the store pursued by the owner and two stock boys, one of whom was shot to death. The other boy saw the robber jump over a fence and run down an alley. Shortly thereafter the police arrived at the scene, and one of the officers followed, in the fresh-fallen snow, a single set of tracks which led from the dead boy's body to a garage. Police officers surrounded the garage and upon entering found the defendant crouched in a corner. A revolver and $1,270 in cash were found nearby.

The plaid cape, abandoned in the store by the robber, the ski mask, and a pair of black trousers which were found a short distance from the garage in which defendant was hiding, were examined in the laboratory of the Federal Bureau of Investigation. Fibers recovered from the cape and from the black trousers showed the same microscopic and chemical properties as the sweater and white trousers worn by defendant when he was arrested. A firearms examiner employed in the Federal Bureau of Investigation's laboratory testified that the fatal bullet was fired from the revolver found when defendant was arrested.

Defendant was taken into custody at approximately 9 p.m. and advised of his rights. En route to the police station he told the police officers that he had been with another person. Upon arrival at the station defendant was given a "waiver of rights" form which he read aloud and signed with a fictitious name. He then told the police that he had been at the Bee Hive Club with a man named Jerry Wilson, and had left there with Wilson in a 1964 or 1965 Mercury. Wilson parked the car and told defendant that he was going to see a friend. Approximately 15 minutes later, defendant left the car and started walking down the street when Wilson returned and handed him a gun and a large amount of money. When defendant saw police cars in the area he jumped a fence and ran into a garage. Shortly thereafter he repeated this story, with slight variations, to two other detectives. After he had been placed in a lineup, photographed and given a neutron activation test, he told the detectives that he did not want to talk anymore. He declined the opportunity to make a telephone call, and at approximately 1 a.m. was placed in a cell.

At 9:30 a.m. Detectives Bland and Fagin resumed the interrogation. Defendant was advised of his rights, signed a rights waiver form and, although he said that he was

willing to talk, stated that he wanted a public defender. Detective Bland testified that "We stated we could not give it to him, that it would have to be determined by the Court whether he could have a Public Defender." Officer Fagin gave him the name of the public defender and a telephone directory. His attempt to reach the public defender by telephone was unsuccessful. Defendant was questioned intermittently until approximately 1:10 p.m., when he again attempted, unsuccessfully, to reach the public defender by telephone. He was returned to his cell, and there is no evidence of further questioning until approximately 5:30 p.m. No attempt was made to introduce into evidence any of the statements made by defendant during the period from 9:30 a.m. to 1:10 p.m.

At approximately 5:30 p.m. Detectives Cronk and Gessner were told that defendant "wanted to talk to some detectives." Defendant was brought to an office on the second floor of the detective bureau and warned of his rights. He said that he understood, and signed the waiver of rights form. Defendant told the detectives that he did not wish to make a statement but wanted to speak to a priest and a psychiatrist. He was told that they could probably get a priest for him that evening but he would not be able to see a psychiatrist until he was taken to the county jail. Defendant was permitted to call his mother by telephone and spoke with her. He was then asked by Detective Gessner how he felt and replied that he "felt real bad about the dead boy, his family, and also his own family." In response to further questions he stated that he was alone that night and that he wanted to talk but wanted more time to think about it.

At approximately 8 p.m. defendant was brought from his cell in order to talk to Father Wentig, the police chaplain. Following his conversation with Father Wentig, defendant

again talked with the police officers, who asked him if it was necessary to advise him of his rights. He told them that he understood them. In response to Detective Gessner's question he stated that he had been involved in one other robbery, that he got nothing out of the first robbery, and that was the reason that he "pulled the second one." He stated that he told the officers about it "because he did not want an innocent person to go to jail."

In reversing the judgment the appellate court held that defendant's right to cut off questioning was not "scrupulously honored," that the statements made after he requested an attorney should have been suppressed, and that the erroneous admission into evidence of those statements required reversal of the judgment and remandment of the cause for a new trial. The People contend that the appellate court erred in reversing the judgment for the reason that the defendant had knowingly waived his rights prior to making the statements, and that, assuming that the statements were erroneously admitted, the error was harmless. It is defendant's position that the statements made during the interrogation following the request for counsel were inadmissible and that the judgment was properly reversed.

In *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Supreme Court said: "If * * * [the accused] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." (384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707, 86 S. Ct. 1602, 1612.) "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege * * *." (384 U.S. 436, 469, 16 L. Ed. 2d 694, 721, 86 S. Ct. 1602, 1625.) "[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. * * * If the individual

states that he wants an attorney, the interrogation must cease until an attorney is present." (384 U.S. 436, 474, 16 L. Ed 2d 694, 723, 86 S. Ct. 1602, 1628.) "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. 436, 475, 16 L. Ed 2d 694, 724, 86 S. Ct. 1602, 1628.

In their brief the People state correctly that "the instant case involves the right to counsel, as distinguished from the right to remain silent." The distinction, and its significance, is elucidated by the opinion in *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321, relied upon by the People in arguing that defendant knowingly waived his right to counsel, wherein the Supreme Court said:

> "7. The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows: 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.
>
> This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If

authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.' [384 U.S. 436, 474, 16 L. Ed. 2d 694, 723-24, 86 S. Ct. 1602, 1608.]" 423 U.S. 96, 101 n. 7, 46 L. Ed. 2d 313, 320 n. 7, 96 S. Ct. 321, 325 n. 7.

"10. The dissenting opinion asserts that *Miranda* established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. *Post,* at 116-117. But clearly the Court in *Miranda* imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.' [384 U.S. 436, 474, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1628.]" 423 U.S. 96, 104 n. 10, 46 L. Ed. 2d 313, 321 n. 10, 96 S. Ct. 321, 326 n. 10.

"2. The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." 423 U.S. 96, 110 n. 2, 46 L. Ed. 2d 313, 325 n. 2, 96 S. Ct. 321, 329 n. 2 (White, J., concurring).

Although we agree with the People that the right to counsel may be waived *(People v. Morgan,* 67 Ill. 2d 1), we

conclude that the People did not meet the "heavy burden *** to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained counsel." (*Miranda v. Arizona*, 384 U.S. 436, 475, 16 L. Ed. 2d 694, 724, 86 S. Ct. 1602, 1628). His requests for an opportunity to speak with a priest and a psychiatrist cannot be construed to be such waiver, nor did his conversation with Father Wentig authorize the resumption of interrogation. The circuit court erred in admitting the statements made after 5:30 p.m.

We consider next the People's contention that the admission into evidence of the statements was harmless error. The record shows that two of the employees of Pacemaker Grocery Store were unable to identify the defendant at a lineup and testimony adduced at the trial appears to corroborate defendant's story that another individual was present at the time. Under these circumstances we find opposite the court's observation in *People v. Henenberg*, 55 Ill. 2d 5, 12: "We have carefully reviewed the evidence, and without deciding whether the admission into evidence of a [statement] obtained in violation of *Miranda* can ever be harmless error, we have concluded that the admission of testimony concerning the defendant's [statements] was not harmless beyond a reasonable doubt. (See, *Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.)"

For the reasons stated the judgment is affirmed.

Judgment affirmed.

MR. JUSTICE MORAN took no part in the consideration or decision of this case.

UNDERWOOD and RYAN, JJ., dissenting:

MR. JUSTICE UNDERWOOD, dissenting:

I am not at all certain that the circumstances here even involve a *Miranda* violation (*People v. Morgan*, 67 Ill. 2d 1), for it was defendant, not the officers, who initiated the conversation the evening following his arrest by indicating he wanted to talk to the officers. He signed the waiver of rights form and asked to talk to a priest and psychiatrist. After being told a priest would be there that evening but that he would have to wait until he was at the county jail to see a psychiatrist, he called his mother and talked to her. When asked how he felt, he answered that he felt "real bad" about the dead boy, his family and defendant's own family. He later indicated he wanted to talk but needed more time to think about it, and the statements which the majority holds improperly admitted were made later that night following defendant's conversation with the police chaplain. But even assuming that a violation did occur, it is entirely clear to me that any error in admitting defendant's statements into evidence was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

The evidence of defendant's guilt is overwhelming. It is undisputed that shortly before the robbery, defendant parked his girl friend's car in front of Clarence Peterson's house near the Pacemaker store. Peterson saw a young man get out of the car, remove a small object from the trunk, put a hood over his head, throw something into the front seat of the car, and walk towards the Pacemaker store.

The woman's plaid cape worn by the robber was found outside the store. Fibers on this cape had the same microscopic and chemical properties as the fibers from the white sweater defendant was wearing when arrested. A ski mask and dark pants were found discarded between the store and the garage where the murder occurred. The pants were turned inside out. Fibers on these pants matched, in

all respects, fibers from the pants defendant was wearing when arrested.

Michael Cook and Henry Gregg were the two stock boys who followed the robber's footprints in the fresh snow to a garage at 1919 South Fourth Street. Gregg was shot in the head as he approached the garage. Cook ran across the street and sought help. On returning to the murder scene, he saw a man in the backyard. This man ran when he saw Cook, jumping over a wire fence into an alley. He then pointed a gun at Cook, who ducked behind the garage. Cook saw him run south down the alley. Police officers, who arrived about 30 seconds after Gregg had been shot, followed a single set of footprints from the body through the alley and up to a partially opened garage door. No other footprints were in the area. Defendant was found crouching in the garage. The murder weapon and robbery proceeds were found beside him. It is undisputed that defendant is the man Cook saw fleeing from the murder scene and that he had the gun and the money, although defendant does deny pointing the gun at Cook.

The theory of the defense is that Jerry Wilson, to whom defendant had given money to buy drugs, committed the crimes, gave defendant the gun and robbery proceeds, and fled. But defendant has given three different versions of this theory containing major inconsistencies. First he told the police he had arrived in the area in Wilson's car with Wilson. Wilson, according to defendant, left the car and returned in 15 minutes, handing defendant the gun and money. Defendant got scared and ran behind some houses into an alley, ultimately hiding in the garage. When the police pointed out that this meant he had the gun before the murder was committed, defendant changed his story. He then admitted driving his girl friend's car to the area and said Wilson ran with him into the garage

where he was found and gave him the gun there, but Wilson left before the police arrived. When informed only one set of footprints was found near the garage, he changed this story. All of the foregoing statements preceded the alleged *Miranda* violation.

Defendant testified at trial that he saw two boys following Wilson, so he circled a house and eventually met Wilson behind a house. Wilson said he had robbed the boys, gave defendant the gun and money, and ran. Defendant went towards the alley to head back toward his car and while doing so ran by Gregg's body. His testimony is inconsistent as to whether he saw the body once or twice.

The State's evidence in this case, including that concerning the matching fibers found on the robber's cape and on the discarded trousers, is well-nigh conclusive. In contrast, defendant's testimony is inconsistent with his earlier statements, contradicted in part by other testimony, and, it seems to me, simply devoid of probative value. If the circumstances which the majority holds constitute a *Miranda* violation are in fact a violation, which I doubt, they could not have prejudiced a defendant whose guilt has been so clearly established.

I would reverse the appellate court and affirm the judgment of the circuit court of Winnebago County.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX B

NO. 75-166

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
WALTER WASHINGTON, JR.,
Defendant-Appellant.

Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant, Walter Washington, Jr., was convicted by jury verdict of armed robbery and murder. He contends that (1) certain statements he made while in custody at Rockford Police Headquarters, after he had requested an attorney, should not have been admitted into evidence, (2) the trial court abused its discretion in denying defendant's motion to exclude at trial his record of a 1965 conviction for burglary, and (3) certain evidence was improperly obtained by the police in an automobile, and therefore should not have been admitted into evidence. (His third contention was raised in defendant's supplemental *pro se* brief filed by leave of court.)

On March 22, 1974, about 8:50 p.m. Mrs. Kappa Sharp,

a cashier at the Pacemaker Grocery Store in Rockford, was busy preparing for closing at 9:00 p.m. A man with a gun came up behind her and told her to open the cash register. She started to scream and he told her if she did he would kill her. She opened the register at his direction and he removed therefrom the five and ten dollar bills ($1270). She described the robber as a Negro who wore a plaid woman's cape with a hood, and a ski mask over his face; the weapon held by him was a silver revolver. Mrs. Sharp pressed a buzzer which caused the store owner, Mr. Zagnoni, and 2 stock boys, Henry Gregg, Jr., age 14, and Michael Cook, age 17, who were stacking milk cases in the back, to come to her. Mrs. Sharp told them of the robbery and the 2 boys ran out the front "OUT" door in pursuit. They then picked up a set of running footprints in the fresh-fallen snow and followed them a short distance to the vicinity of the garage. Henry was about 10 feet in front of Michael and about 25 feet from the corner of a garage when Michael saw the barrel of a gun from behind the corner of the garage. Michael's warning to Henry to "duck" came too late when the robber fired a shot, which struck Henry in the head, causing his death. The robber pointed the weapon at Michael but fled, jumping a fence into an adjacent alley. By that time police arrived on the scene and Police Officer Emigholtz followed a single set of tracks in the snow to another garage. After receiving re-enforcements he entered and found defendant "crouching" in a corner with what turned out to be the murder weapon and with the robbery proceeds lying on the floor at the defendant's feet.

It was then about 9:00 p.m. Officer Emigholtz arrested the defendant and advised him of his "rights" (under *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602). Defendant was "cuffed", led into a

squad car where officer Murphy advised defendant of his rights; defendant stated he understood them. In response to a question he told Officer Murphy that he was with another person in a 1963 or 1964 white Mercury. At the police station Detective Cronk advised the defendant of his rights by handing him a rights' waiver form, which listed his rights in detail followed by a "waiver of rights". Defendant read the form aloud, said he understood his rights and signed the form using the name "William Brown", the name he had given the police. The defendant then made an oral statement in some detail in the presence of Detective Cronk and Officers Emigholtz and Murphy. The substance of the statement was that he saw a fellow named Jerry Wilson at the Bee Hive Club at about 7:30 p.m. and defendant had a couple of drinks there; they left together, got into Wilson's 1964 or 1965 white Mercury; Wilson then drove to Kishwaukee Street, drove down it, then turned left about a block, then turned right, and parked; Wilson got out of the car and told defendant he was going to see a friend; the defendant stayed in the car about 15 minutes and then got out and started walking down the street; Wilson then came up to him and handed him a gun and a large amount of money; the defendant then saw many police cars in the area and started to run through yards, jumped a fence, ran until he saw a garage was open, went inside and hid in a corner until the police arrived and took him into custody.

When Detective Salamone came into the interrogation room defendant was asked to repeat his statement. He did so but this time stated that after he got the gun and money Wilson ran into the garage with him, stayed awhile and then left. When Detective Palmeri came into the room the defendant repeated this statement.

Defendant was then photographed, given a neutron ac-

tivation test and placed in a line-up. At about 1:00 a.m. he was brought back to the interrogation room. The officers talked to the defendant about the line-up and defendant's involvement in the crime, and defendant stated that he did not wish to talk to them anymore. He was then taken to the booking room and when asked if he wished to make a telephone call said he did not wish to do so. There was no further interrogation of the defendant until the following morning and, defendant, not having indicated a desire to consult with a lawyer, there is no claim that the procedures followed to that point did not fully comply with the strictures of the *Miranda* opinion.

At about 9:30 a.m. on March 23 Detective Bland and Officer Fagin brought the defendant from his cell to an office in the Detective Bureau for resumption of interrogation. Officer Fagin advised the defendant of his rights again. The defendant said he understood them, was willing to talk, and to sign the rights' waiver form which he did. Shortly after the officers began to speak with the defendant he stated he wanted a public defender. Detective Bland told him "they could not give it to him, that it would be determined by the court whether he could have a public defender". He told defendant the name of the Public Defender — Peterson — and gave him the telephone book. The defendant looked up the number, dialed, but received no answer. Officer Fagin asked him if he still wanted to talk to the officers about the case, not having talked to an attorney, and the defendant said "yes", that he wanted to get the truth out but first wanted to talk to his mother. He dialed a number but the line was busy. He then dialed again and had a conversation which the officer later learned was with his "girl friend". Delores Fair.

The officers later learned that the latter conversation was tape recorded. When they learned about it they took the defendant to the radio room where they had the tape recording played twice for the defendant. (The transcript of the hearing on defendant's motion to suppress shows that that conversation began at 9:44 a.m. and recites: "The tape recorded conversation was then played for the court but because of the unintelligible nature of a lot of it, was not recorded or transcribed." At the conclusion of that hearing the trial court suppressed those tape recordings, and on motion *in limine,* by defendant's counsel, Mr. Peterson, the trial court barred at trial any testimony or any reference in any manner to that telephone conversation with Ms. Fair.)

The officers then took the defendant back to the office and questioned him until about 1:10 p.m. The defendant tried again to reach the Public Defender by telephone but received no answer. Defendant was then returned to his cell. (None of the statements made by the defendant during the period from 9:30 a.m. to 1:10 p.m. were introduced at trial.) There was no evidence of further questioning of the defendant during the ensuing period until about 5:30 p.m.

At about 5:30 p.m. on March 23 defendant wanted to talk to "some detective". Detectives Cronk and Gessner responded and brought the defendant to the office. Detective Gessner warned defendant of his rights by reading the rights' waiver form to him. The defendant responded that he understood his rights, having been advised before. Detective Gessner then had him sign the rights' waiver form. Defendant told them that he didn't wish to make a statement, and that he did want to speak to a priest and a psychiatrist. Detective Gessner told defendant that they could probably get a priest for him that evening but he

would not be able to have a psychiatrist until he got to the county jail. The defendant was then allowed to call his mother and spoke to her. After this telephone conversation Detective Gessner asked the defendant how he felt and defendant replied that he "felt real bad about the dead boy, his family, and also his own family". In response to further questions by Detective Gessner defendant answered that he was alone when he left Freeport and so remained "all night long". When asked whose car he had the night of the robbery he replied that he wanted to talk but wanted more time to think about it. The defendant was then returned to his cell.

At about 8:00 p.m. Detectives Gessner and Cronk brought the defendant from his cell in order that he could talk to Father Wentig, the police chaplain. After that private conversation which lasted about 45 minutes the officers spoke again with the defendant for about 5 or 10 minutes. They asked him if it was necessary to advise him of his rights. The defendant said he understood them. He then told them, in response to Detective Gessner's question, that he had been involved in 1 other robbery and volunteered that he "got nothing out of" the first robbery, that that was the reason he "pulled the second one", and that he wanted to tell the officers about it because he did not want an innocent person going to jail. To another question about the other robbery, defendant finally responded that he had better talk to an attorney. Detective Cronk "looked up" Mr. Peterson's residence telephone number, the call was placed and defendant conversed with him. No subsequent statements of defendant were offered in evidence by the State.

The defendant contends that all statements made by him after he requested an attorney about 9:30 a.m. on March 23 should have been suppressed, and that the admission into

evidence of those statements violated his Fifth Amendment privilege against self-incrimination under the doctrine of the *Miranda* decision. We agree.

The procedures to be followed if the person in custody asks to consult with a lawyer are detailed in the *Miranda* opinion as follows:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. * * *
>
> * * * If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." 384 U.S. 436, 474, 16 L. Ed. 2d 694, 723-24.

Earlier in that opinion the court said:

> "The mere fact that he [the defendant] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." 384 U.S. 436, 445, 16 L. Ed. 2d 694, 707.

In the case at bar, while the statements made by the defendant between 9:30 a.m. and about 1:10 p.m. were not introduced at trial, the statements he made after 5:30 p.m. on March 23, which were, should have been suppressed. During that questioning the defendant stated he had been involved in another robbery and that he "felt bad about the dead boy * * *."

It is true, as the State emphasizes, that the defendant was specifically advised of his *Miranda* rights on five different occasions and signed written waivers of those rights

on three of them. The State relies on *People v. White* (1975), 61 Ill. 2d 288, in which the Illinois Supreme Court concluded that a confession was voluntary even though the defendant confessed after having been questioned subsequent to defendant's request to see a lawyer. However, in *White* the subsequent interrogations resulting in a confession after a lapse of 36 hours subsequent to his request to speak to an attorney, were with respect to unrelated offenses, and there was an 8 hour lapse between the time the defendant initially requested an attorney and tried to reach him and the time he made his first admission.

In *Michigan v. Mosley* (1975), 423 U.S. 98, 46 L. Ed. 2d 313, 96 S. Ct. 321, the defendant who had been arrested on robbery charges, was given the *Miranda* warnings, and the detective immediately ceased interrogation when defendant stated he did not want to discuss the robberies, and did not try to resume questioning. After an interval of more than 2 hours and again admonishing the defendant of his *Miranda* rights another detective questioned defendant solely about an unrelated murder, and defendant then made an incriminating statement. The United States Supreme Court, after considering several possible interpretations of the *Miranda* case, concluded that under such circumstances the defendant's right to cut off questioning about the robberies was "scrupulously honored", and that subsequent questioning about an *unrelated* homicide was consistent with a reasonable interpretation of his earlier refusal to answer questions about the robberies. In doing so, the court said:

> "This is not a case * * * where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here

> immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." (423 U.S. 98, —, 46 L. Ed. 2d 313, 322, 96 S. Ct. —, 327.)

In the case at bar, while the police officers provided a "fresh set of warnings" after the defendant requested counsel, they resumed interrogation with respect to the same crimes which had been the subject of the earlier interrogation. The defendant's right to cut off questioning was therefore not "scrupulously honored" and the statements made by defendant after he requested counsel should have been suppressed and were inadmissible. See *People v. Parnell* (1975), 31 Ill. App. 3d 627, 630.

The State argues that even if the statements introduced as evidence against the defendant at trial were inadmissible, their use as evidence in this case was harmless error and does not require reversal. We have examined the evidence and note that the circumstantial evidence of defendant's guilt of both offenses is very impressive. However, we are unable to say that it is so overwhelming as to enable us to determine beyond a reasonable doubt that the error did not contribute to the jury's guilty verdict. See *People v. Wilson* (1975), 60 Ill. 2d 235, 242.

In view of our holding no purpose would be served in considering defendant's second contention for the reason that in a new trial evidence of defendant's 1965 conviction may become inadmissible under the holding of the Illinois Supreme Court in *People v. Montgomery* (1971), 47 Ill. 2d 510, which adopted the substance of Rule 609 of the Federal Rules of Evidence as the rule of law in Illinois.

We now consider the defendant's third contention. He

argues that certain evidence obtained from an automobile near the scene of the crime at about 10:00 a.m. on March 23 should have been suppressed because (1) it was the fruit of an unlawful taping of defendant's telephone conversation with Ms. Fair, (2) the seizure occurred at a time too remote to have been incident to the arrest, and (3) there were no exigent circumstances to justify a warrantless search and seizure. While the defendant may be precluded from raising this issue on review by failure to present it to the trial court, our remandment of this case for a new trial requires a statement of our views on this question. The record discloses that defendant's telephone conversation with Ms. Fair began at 9:44 a.m. It does not disclose the contents of that conversation or that the defendant revealed therein to Ms. Fair the location of her vehicle (which was near the scene of the crime). While that conversation was recorded on tape and played twice at the hearing on the motion to suppress the transcript recites that "because of the unintelligible nature of a lot of it" it "was not recorded or transcribed". The trial court suppressed it at the conclusion of the hearing on defendant's motion and later granted defendant's motion *in limine* barring at trial any testimony or reference thereto in any manner.

Moreover, the testimony at trial was that the police were at the location of the automobile in question by 10:00 a.m. on March 23. The ignition keys were inserted in the ignition lock and were visible. The car doors were unlocked. Inside the car the police found defendant's white boots and a billfold containing a driver's license belonging to defendant in an envelope bearing the name of "Andrew Washington" and the police removed from the gear shift knob of that car a latent fingerprint which was identified as that of the defendant.

The automobile in question was the property of Ms. Fair, the defendant's girl friend. The defendant, therefore, did not have a "proprietary or possessory interest in the car" and is not in a position to challenge the legality of the search on that basis. (*People v. Henenberg* (1973), 55 Ill. 2d 5, 13). The fact that the keys were in the car and the possibility that defendant's friends or family might remove it provided exigent circumstances for the police to enter the car and seize the evidence without a warrant. In *Cardwell v. Lewis* (1974), 417 U.S. 583, 595, 41 L. Ed. 2d 325, 338, 94 S. Ct. 2464, ___, where the defendant had been arrested and after interrogation an awareness arose that his car constituted incriminating evidence, the Supreme Court observed that because of that, "the incentive and potential for the car's removal substantially increased". The court stated:

> "Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. Chambers [v. Maroney], 399 U.S. [42], at 50-51 * * *. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." (417 U.S. 583, 595-596.)

For the reasons stated in this opinion the judgment of the circuit court of Winnebago County is reversed and the cause is remanded for a new trial.

Reversed and remanded.

THOMAS J. MORAN, P.J. and DIXON, J., concur.